Tentative Rulings for May 12, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG03681 *Cintron v. Moreno et al.* (Dept. 403)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECG00071 ***Molina v. Community Medical Centers et al.*** **is continued to Thursday, May 26, 2016 at 3:30 p.m. in Dept. 403**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(6)

Tentative Ruling

Re: ***West v. City of Coalinga***
Superior Court Case No.: 14CECG03355

Hearing Date: May 12, 2016 (**Dept. 402**)

Motion: By Defendants City of Coalinga, Cal Minor, Simon Sauceda, Christopher Montoya, and George Munoz, for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

To deny.

Explanation:

The Court notes at the outset that on April 28, 2016, Plaintiff Andrea West has dismissed the first, third, fourth, and fifth causes of action, without prejudice, as well as dismissing Defendants Cal Minor, Christopher Montoya, and George Munoz.

Defendants have failed to meet their burden. (Code Civ. Proc., §437c, subd. (p)(2).)

California Rules of Court, rule 3.1350(b) provides in relevant part [emphasis added]: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, *verbatim*, in the separate statement of undisputed material facts."

California Rules of Court, rule 3.1350(d) provides in relevant part [emphasis added]: "The Separate Statement of Undisputed Material Facts in support of a motion must separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense."

Here, the notice of motion and the separate statement have entirely different headings for the adjudications sought and in fact, the notice of motion contains eight such issues, while the separate statement contains only seven. They are required to be repeated from the notice of motion to the separate statement verbatim.

What Defendants have done here is place the burden of determining which of the 58 facts, repeated over and over again seven or eight times, depending on what is

actually sought to be summarily adjudicated, are significant to each of those adjudications. That is not the court's function on a motion for summary judgment.

"Materiality, i.e., what matters are in issue, is determined mainly by the pleadings, the rules in pleading and the substantive law relating to the particular kind of case. Therefore, in alleging material facts which the moving party contends are undisputed, it is incumbent upon the moving party to show the materiality of the facts by identifying, in the summary judgment pleadings, how the undisputed facts apply to specific issues raised by the complaint or answer and how they entitle the moving party to judgment as a matter of law. As has long been recognized, the initial duty to define the issues presented by the complaint or answer and to challenge them factually is on the party who seeks a summary judgment." [Internal citations and quotation marks omitted.] (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67.) It is not the duty of the trial court to detect all the issues presented by the complaint and the answer and then to search through the allegations of undisputed facts and identify the legal significance of each fact. (*Id.* at pp. 67-68.) "A contrary rule not only would run afoul of a commonsense reading of section 437c as a whole, but also would impose an undue burden on the trial court." (*Id.* at p. 67.)

Further, Code of Civil Procedure section 437c, subdivision (b)(1) provides, in relevant part: "The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." Code of Civil Procedure section 437c, subdivision (c) provides that the motion for summary judgment "shall be granted if all *the papers* submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether *the papers* show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in *the papers*, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." [Emphasis added.]

There is nothing in the summary judgment statute that permits the motion to be based on videos. "The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." A transcript of the video interview of Plaintiff would have been permitted, just as it is with transcripts of deposition testimony. Facts #3, 8, 17, are based, in part, on the video. Facts #37-44, are based exclusively on a video DVD Defendants submitted with their moving papers. A motion for summary judgment is a paper-driven procedure, as the statute provides.

Even if Defendants can be said to have met their burden on any of the causes of action or defenses, Plaintiff disputes facts #11, #13, #18, #23, and #40. Fact #11 is that Office Sauceda also asked Plaintiff for her registration, but she did not have that either, with a disputation that Plaintiff had registered the vehicle, but could not locate the actual paper proof; the DMV print out shows the vehicle was registered to Plaintiff. Fact #13 is that the address on record with the DMV was different than the address Ms. West

provided to Officer Sauceda, with a disputation that the DMV print out shows the vehicle was registered to Plaintiff at her correct address. Fact #18 is that Plaintiff put her hands on her face and giggled [during the stop], with a disputation that Plaintiff denies this. Fact #23 is that Officer Sauceda ordered Plaintiff out of the vehicle, handcuffed her, and placed her in the rear of his patrol vehicle, with a disputation that Officer Sauceda grabbed Plaintiff's arm and pulled her out of the car, roughly handcuffing her. Fact #40 is that during her video interview, Plaintiff Andrew West admits that she did not have a valid driver's license, with a disputation that Plaintiff admitted she had in her possession an expired driver's license, she renewed her driver's license but it had not yet arrived.

Presumably, each one of these material facts, repeated verbatim for each of the seven (or eight) adjudications sought, is a material one. "The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion." (Cal. Rules of Court, rule 3.1350(d)(2).)

If there is one, single material fact in dispute, a motion for summary judgment must be denied. (*Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3d 237, 240.)

The motion must be denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/11/16 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Julia Najieb v. Valley Economic Development Center, Inc.***
Superior Court No. 15CECG02436

Hearing Date: Thursday, May 12, 2016 (**Dept. 402**)

Motion: Defendant Valley Economic Development Center, Inc.'s Demurrer to Plaintiff Julia Najieb's Complaint

Tentative Ruling:

To sustain with leave to amend Defendant Valley Economic Development Center, Inc.'s demurrer to Plaintiff Julia Najieb's first, second, and third causes of action pursuant to Code of Civil Procedure section 430.10, subdivision (e).

To grant Plaintiff Julia Najieb 10 days, running from service of the minute order by the clerk, to file and serve a first amended complaint. (Code Civ. Proc., § 472a, subd. (c).) All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

1. Defendant's Demurrer to Plaintiff's First Cause of Action for Fraudulent Misrepresentation

Defendant Valley Economic Development Center, Inc. ("Defendant") demurs to Plaintiff Julia Najieb's ("Plaintiff") first cause of action for fraudulent misrepresentation on the ground on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendants. "To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (*Manderville v. PCG&S Group, Inc*. (2007) 146 Cal.App.4th 1486, 1498.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered." (*Small v. Fritz Companies, Inc*., (2003) 30 Cal.4th 167, 184 [internal quotes omitted].)

The Court determines that Plaintiff has not alleged all of the facts necessary to establish a viable cause of action for intentional misrepresentation. First, Plaintiff has sufficiently alleged that the representations made by Defendant's agent, Joi Eubanks, were false. (Plaintiff's Complaint, ¶¶ 10-11, 14-15 & 19.) Second, Plaintiff has adequately alleged that Defendant's agent knew that the representations were false when she made them. (Plaintiff's Complaint, ¶ 20.) Third, Plaintiff has sufficiently pled that Defendant's agent intended that Plaintiff rely on the representations. (Plaintiff's Complaint, ¶ 20.) Fourth, Plaintiff has satisfactorily alleged that she reasonably relied on Defendant's agent's representations when she began construction on a television studio and entered into a television network joint venture agreement. (Plaintiff's Complaint, ¶¶ 11-13 & 21.) Fifth and sixth, Plaintiff has adequately pled that she was harmed and that her reliance on Defendant's agent's representations was a substantial factor in causing her harm. (Plaintiff's Complaint, ¶¶ 12-13 & 22.)

However, while Plaintiff has alleged that Ms. Eubanks represented to Plaintiff in June 2013 that the loan that Plaintiff had applied for would be funded and was guaranteed and represented to both Plaintiff and Plaintiff's contractor in July 2013 that the loan that Plaintiff had applied for had been approved and that the funds would be available in two to three weeks, Plaintiff has failed to allege how, where, and by what means these representations were tendered and, hence, Plaintiff has failed to allege that Defendant represented to Plaintiff that an important fact was true. (Plaintiff's Complaint, ¶¶ 9-11, 14-15, & 17-18.)

Accordingly, the Court sustains with leave to amend Defendant's demurrer to Plaintiff's first cause of action for intentional misrepresentation pursuant to Code of Civil Procedure section 430.10, subdivision (e).

2. Defendant's Demurrer to Plaintiff's Second Cause of Action for Negligent Misrepresentation

Defendant demurs to Plaintiff's second cause of action for negligent misrepresentation on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendant. To state a viable cause of action for negligent misrepresentation, a plaintiff must plead sufficient facts establishing that: (1) that defendant represented to plaintiff that a fact was true; (2) that defendant's representation was not true; (3) that defendant had no reasonable grounds for believing the representation was true when they made it; (4) that defendant intended that plaintiff rely on this representation; (5) that plaintiff reasonably relied on defendant's representation; (6) that plaintiff was harmed; and (7) that plaintiff's reliance on defendant's representation was a substantial factor in causing plaintiff's harm. (CACI No. 1903.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered." (*Small v. Fritz Companies, Inc*., (2003) 30 Cal.4th 167, 184 [internal quotes omitted].)

The Court determines that Plaintiff has not alleged all of the facts necessary to establish a viable cause of action for negligent misrepresentation. First, Plaintiff has sufficiently alleged that the representations made by Defendant's agent, Joi Eubanks, were false. (Plaintiff's Complaint, ¶¶ 10-11, 14-15, & 25.) Second, Plaintiff has adequately alleged that Defendant's agent made the representations without a reasonable basis for believing the representations to be true. (Plaintiff's Complaint, ¶ 25.) Third, Plaintiff has sufficiently pled that Defendant's agent intended that Plaintiff rely on the representations. (Plaintiff's Complaint, ¶ 27.) Fourth, Plaintiff has satisfactorily alleged that she reasonably relied on Defendant's agent's representations when she began construction on a television studio and entered into a television network joint venture agreement. (Plaintiff's Complaint, ¶¶ 11-13 & 27.) Fifth and sixth, Plaintiff has adequately pled that she was harmed and that her reliance on Defendant's agent's representations was a substantial factor in causing her harm. (Plaintiff's Complaint, ¶¶ 12-13 & 28.)

However, while Plaintiff has alleged that Ms. Eubanks represented to Plaintiff in June 2013 that the loan that Plaintiff had applied for would be funded and was guaranteed and represented to both Plaintiff and Plaintiff's contractor in July 2013 that the loan that Plaintiff had applied for had been approved and that the funds would be available in two to three weeks, Plaintiff has failed to allege how, where, and by what means these representations were tendered and, hence, Plaintiff has failed to allege that Defendant represented to Plaintiff that a fact was true. (Plaintiff's Complaint, ¶¶ 9-11, 14-15, & 25-26.)

Accordingly, the Court sustains with leave to amend Defendant's demurrer to Plaintiff's second cause of action for negligent misrepresentation pursuant to Code of Civil Procedure section 430.10, subdivision (e).

3. Defendant's Demurrer to Plaintiff's Third Cause of Action for Negligence

Defendant demurs to Plaintiff's third cause of action for negligence on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendant. To plead a viable cause of action for negligence, a plaintiff must allege the following essential elements: (1) defendant's legal duty of care; (2) defendant's breach of duty (i.e., the negligent act or omission); (3) the breach was a proximate or legal cause of her injury (i.e., causation); and (4) damages. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

The Court determines that Plaintiff has alleged not all of the facts necessary to establish a viable cause of action for negligence. Specifically, Plaintiff has failed to adequately plead Defendant's legal duty of care. "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) Rather, "[l]iability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender.' " (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35.) Courts have interpreted "active participation" to include financial participation in the borrower's

investment or project and the provision of "extensive" financial and legal advice after the borrower provided the lender confidential information. (See *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 207; *Kinner v. World Sav. & Loan Assn.* (1976) 57 Cal.App.3d 724, 728-734.)

Here, Plaintiff alleges that Defendant owed her a duty to submit loan documents to lenders, not to misrepresent that the documents had been submitted, not to misrepresent that the loan would be funded, not to misrepresent that the loan was guaranteed, and to properly advise and council Plaintiff with regard to the loan process. However, submitting and processing loan applications and providing information about loan applications are traditional lending activities. While Plaintiff argues that Defendant was acting outside of the traditional role of a lender because Defendant is a company engaged in the business of obtaining and supplying loans to minority-owned small businesses who are unable to qualify for traditional bank financing and holds itself out as such, Plaintiff fails to allege any facts in her complaint demonstrating that Defendant was actively involved in Plaintiff's enterprise beyond the domain of the usual money lender. Therefore, the Court determines that Defendant did not owe Plaintiff a duty to submit loan documents to lenders, not to misrepresent that the documents had been submitted, not to misrepresent that the loan would be funded, not to misrepresent that the loan was guaranteed, and to properly advise and council Plaintiff with regard to the loan process.

Accordingly, the Court sustains with leave to amend Defendant's demurrer to Plaintiff's third cause of action for negligence pursuant to Code of Civil Procedure section 430.10, subdivision (e).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/11/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(2)

Tentative Ruling

Re: ***In re Gracie Smith***
Superior Court Case No. 16CECG00931

Hearing Date: May 12, 2016 (Dept. 403)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny without prejudice. A petitioner with proper standing must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petitions. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition is not being submitted by a proper petitioner on behalf of the minor. The minor may appear by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. CCP §372. The petitioner has not applied to be appointed guardian ad litem in this civil action. The fact that the petitioner was appointed GAL in another court case is not sufficient.

The petition requests that the proceeds of the settlement be transferred to the trustee of the trust that is either created by or approved of in the order approving the settlement. The terms of this trust are to be specified at Attachment 19b(7). The 3 paragraph statement in Attachment 19(b)7 is not a proper trust document. A proper trust instrument is required. A proper petitioner must file the trust with the Probate Division in order to have the trust approved. (Super. Ct. Fresno County, Local Rules, rule 7.19.) Once the trust is approved a proper petitioner may file a new petition for approval of compromise in the Civil Division.

The declaration of the petitioner contradicts the disposition of the proceeds set out in the petition. The declaration states that the proceeds will be deposited into a blocked account until the minor turns 18. The name, branch and address of the depository is not provided. The proposed order contemplates deposit in a blocked account but again the name, branch and address of the depository is not provided.

The court notes that a petition for minor's compromise does not need to contain every medical bill or record related to the incident giving rise to the petition. What is required is a medical report containing a diagnosis or prognosis of the injuries and a report of the current condition. It is difficult to determine if such reports are buried within the 1206 untabbed pages. The Court further notes that the petitioner failed to

separate the exhibits via hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. Nor has the petitioner complied with Local Rule 1.1.10 in that they used a prong fastener that greatly exceeded the 2" limit.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/10/16 .
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Integrated Voting Solutions, Inc. v. Wagoner***
Court Case No. 16CECG00371

Hearing Date: May 12, 2016 (Department 403)

Motion: by defendant Wagoner to quash service of summons, or in the alternative, to dismiss on the basis of forum non conveniens

Tentative Ruling:

To deny.

Explanation:

1. Motion to Quash

On a motion to quash, the plaintiff bears the burden of proof, by a preponderance of the evidence, to establish the requisite contacts with the forum. *Aquila, Inc. v. Superior Court* (2007) 148 Cal. App. 4th 556, 568 (*rev. denied*). But if plaintiff does meet that burden of proof, the burden then shifts to the defendant to show an exercise of jurisdiction over him would be unreasonable. *Centerpoint Energy, Inc. v. Superior Court* (2007) 157 Cal. App. 4th 1101, 1118.

In order to establish general jurisdiction, the defendant must have "extensive, wide-ranging, substantial, continuous and systematic contacts" with California. See *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147. IVS does not argue that such exists for this motion. For specific jurisdiction, see *Vons Co. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 446 (cites and quotes omitted):

> "If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits, and the controversy is related to or arises out of a defendant's contacts with the forum.'"
>
> "The United States Supreme Court has described the forum contacts necessary to establish specific jurisdiction as involving variously a nonresident who has purposefully directed his or her activities at forum residents, or who has purposefully derived benefit from forum activities, or purposefully availed himself or herself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. The court also has referred to the requisite forum contact as involving a nonresident defendant who deliberately has engaged in significant activities with a State or has created continuing obligations between himself and residents of the forum, concluding that in such cases the defendant manifestly has availed himself of the privilege of conducting business, and because his activities are shielded by the

> benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."
>
> (*Id*., at pp. 446-447, internal citations and quotes omitted.)

"Doing business is doing a series of similar acts for the purpose of thereby realizing a pecuniary profit, or otherwise accomplishing an object . . ." 2 Witkin, California Procedure (4th Ed.) "Jurisdiction," section 133 on page 677, citing a 1969 Judicial Council report.

Making a fraudulent representation to a California resident can also furnish a basis for finding a defendant is subject to personal jurisdiction in this state. See *Moncrief v. Clark* (2015) 238 Cal. App. 4th 1000, 1008: "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Other cases finding personal jurisdiction where fraud was allegedly directed at a California resident are *Anglo Irish Bank v. Superior Court* (2008) 165 Cal. App. 4th 969 and *Gilmore Bank v. AsiaTrust New Zealand Ltd.* (2014) 223 Cal. App. 4th 1558.

Defendant accepted employment with a Fresno company, which required several trips to Fresno as part of the work duties, and for which defendant got pecuniary benefits in the form of wages, health insurance, and more. There are allegations that he made misrepresentations to the Fresno company for the purpose of obtaining further, ongoing, pecuniary gain, and he certainly had continuing obligations to the Fresno business for a period of years. The willingness to travel to California business also tends to show that jurisdiction here would not offend traditional notions of fair play and substantial justice.

2. Motion to Dismiss due to Forum Non Conveniens

> "Because a court which has dismissed a suit cannot thereafter protect the interests of the litigants, we have consistently held that except in extraordinary cases a trial court has no discretion to dismiss an action brought by a California resident on grounds of forum non conveniens. In *Goodwine v. Superior Court, supra*, 63 Cal. 2d 481, 485 . . . we said that 'A determination that a plaintiff is domiciled here would ordinarily preclude granting the defendant's motion for dismissal on the ground of forum non conveniens."
>
> *Archibald v. Cinerama Hotels* (1976) 15 Cal. 3d 853, 858.

In *Stangvik v. Shiley, Inc*. (1991) 54 Cal. 3d 744, the Supreme Court ruled that it was permissible to stay an action on forum non conveniens grounds to allow the suits to proceed in Norway and Sweden, even though the heart valves claimed defective were designed, manufactured, tested, and packaged in California. One reason was

that fraud was allegedly directed to residents of those countries. The stay order was made subject to seven conditions, with which defendants agreed to comply.

> "In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation."

Id. at 751, citing Judicial Council Comments to Code of Civil Procedure section 410.30.

Another listed consideration is whether or not the proposed alternate forum has a bar to the action, such as a different statute of limitations. The trial court in *Stangvik* required that defendant agree to toll the statute of limitations. "On a motion for forum non conveniens defendant, as the moving party, bears the burden of proof. The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard." *Stangvik*, *supra*, 54 Cal. 3d at 751.

Moving party here – defendant - has failed to show that Washington will furnish a forum which protects the interests of IVS as well as would California. The local company, IVS, contends that it was deprived of funds because it sent those to Washington based on unfulfilled promises by Wagoner, or due to fraud on the part of Wagoner. There is no discussion of any statute of limitations in Washington, or how that state handles contract and fraud claims.

Defendant's statement on "Information and belief" that witnesses are located in Washington is an admission that defendant declarant lacks personal knowledge of the residence of his proposed witnesses.

"In judicial proceedings, it is well settled that affidavits made upon information and belief as to facts that have transpired are hearsay and must be disregarded." *Yamada Brothers v. Agricultural Labor Relations Bd.* (1979) 99 Cal. App. 3d 112, 117, fnt. 1.

Defendant has failed to meet its evidentiary burden to show that Washington will furnish the same legal protections to IVS that California law would. Defendant also

failed to provide admissible evidence of the residence of witnesses other than himself. If defendant could travel here repeatedly for the purpose of pecuniary gain, defendant should be able to travel here for the purpose of trial as well.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/10/16 .
(Judge's initials) (Date)

(2)

Ruling

Re: ***In re Joseph Hernandez***
Superior Court Case No. 16CECG01211

Hearing Date: May 12, 2016 (**Dept. 403**)

Motion: Expedited Amended Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Tentative Ruling
Issued By: KCK on 05/10/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Mendoza v. Montico, Inc., et al.***, Superior Court Case No. 14CECG00993

Hearing Date: **May 12, 2016 (Dept. 501)**

Motion: Montico Inc.'s Motion for Summary Judgment / Adjudication

Tentative Ruling:

To grant the motion for summary judgment. (Code Civ. Proc. § 437c(c).) Prevailing party to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Ernest Mendoza pleads causes of action for motor vehicle, general negligence, and negligent entrustment. The Complaint alleges that defendants Montico, Inc. and John Grady owned, drove, and negligently entrusted the vehicle that collided with plaintiff.

What actually happened was defendant Grady stole a vehicle from defendant Montico's lot where Montico stores its vehicles, and maintains the keys in a locked key cabinet. Montico never employed Grady or allowed or gave him permission to operate any of its vehicles. It was only after the police informed Montico of the accident that it discovered that the van had been stolen.

There is no basis for holding Montico liable under these circumstances. There is no special relationship or showing of special circumstances indicating Montico was negligent in allowing the vehicle to be stolen or driven by a person it was on notice was incompetent to handle the vehicle. (See *Richards v. Stanley* (1954) 43 Cal.2d 60; *May v. Nine Plus Properties* (2007) 143 Cal.App.4th 1538; and *Avis Rent A Car System, Inc. v. Superior Court* (1993) 12 Cal.App.4th 221.)

Accordingly, the unopposed motion should be granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/11/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Babcock et al. v. Centex Homes et al.***
Case No. 12CECG04013
Centex Homes et al. v. Windows By Advanced, Inc., et al.
Case No. 13CECG02959

Hearing Date: **May 12, 2016 (Dept. 501)**

Motion: Travelers Indemnity Company's (on behalf of Fresno Truss, LLC) Motion to Determine Good Faith Settlement

Tentative Ruling:

To grant. (Code Civ. Proc. § 877, *et seq*.)

Explanation:

Under Code Civ. Proc. § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc. § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc. § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc. § 877.6(c).)

Where the motion for good faith settlement is not contested, a barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient to meet the settling party's burden of showing good faith. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261.)

Inasmuch as the motion is uncontested, the court finds that the motion is sufficient to show a prima facie showing of good faith.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will

serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/11/16 .
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Khaled Abualrejal v. Shogay Ahmed***

Superior Court No. 15CECG03604

Hearing Date: Thursday May 12, 2016 (**Dept. 501**)

Motion: (1) Defendants' Motion for Sanctions

Tentative Ruling:

To Deny.

Explanation:

Defendants argue that in waiting to file his first amended Complaint until after Defendants filed their demurrer, Plaintiff abused the processes outlined in California Rules of Court, rule 3.724 and Code of Civil Procedure section 430.41. This (allegedly) caused Defendants to incur unnecessary expenses, so that Plaintiff should therefore be sanctioned (Memo, filed 3/25/16 p4 lns9-10).

California Rules of Court, rule 2.30
California Rules of Court, rule 2.30 authorizes the Court to impose monetary sanctions against a party or counsel, or both, or against a witness, an *insurer or any other person or entity* whose approval is necessary for settlement of a case, for failure to comply with California Rules of Court pretrial and trial rules. The Court may order "reasonable monetary sanctions" payable to the Court or to the opposing party or counsel, "*in addition to any other sanctions permitted by law*." (Cal. Rules of Court, rule 2.30(b) (emphasis added).) In addition, the Court may order payment of the opposing parties' reasonable expenses, including reasonable attorney fees and costs, incurred in connection *with the sanctions motion*. (Cal. Rules of Court, rule 2.30(d); *Sino Century Develop. Ltd. v. Farley* (2012) 211 Cal.App.4th 688, 698—recovery limited to fees incurred in connection with sanctions motion, not all fees incurred as result of rule violation.) There is no limitation on the amount of monetary sanctions that can be imposed under Rule 2.30 for violation of California Rules of Court. (*Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 976.)

California Rules of Court, rule 2.30 sanctions may be imposed either on a party's motion or by the Court on its own motion, if written notice and opportunity to be heard are provided. (Cal. Rules of Court, rule 2.30(c).) A party's motion for sanctions must: (1) set forth the applicable California Rules of Court pretrial or trial rule that has been violated; (2) describe the specific conduct that is alleged to have violated the rule; and (3) identify the attorney, law firm, party, witness or other person against whom sanctions are sought. (Cal. Rules of Court, rule 2.30(c).)

Here, Defendants are requesting sanctions pursuant to California Rule of Court, rule 2.30 for Plaintiffs alleged failure to comply with California Rule of Court, rule 3.724 (duty to meet and confer prior to the case management conference). Defendants are requesting $2,733.25 for "the entirely avoidable fees and costs incurred in bringing this motion (referring to the demurrer) and the motion for sanctions" (Memo, filed 3/25/16 p3 lns 3-4); this request is improper because sanctions are allowed in connection with the sanctions motion *only*. Nonetheless, Defendants do not establish a violation of California Rule of Court, rule 3.724.

California Rule of Court, rule 3.724

California Rules of Court, rule 3.724 requires the parties to meet and confer no later than 30 calendar days before the date set for the case management conference, to consider each of the issues to be considered at the conference, including:

(1) resolving any discovery disputes and setting a discovery schedule;
(2) identifying and, if possible, informally resolving any anticipated motions;
(3) identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;
(4) identifying the facts and issues in the case that are in dispute;
(5) determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of a motion or otherwise;
(6) determining whether settlement is possible;
(7) identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability;
(8) any issues relating to the discovery of electronically stored information as indicated;
(9) other relevant matters

Here, Defendants argue that Plaintiff violated California Rule of Court, rule 3.724 because he refused to "informally resolv[ing] any anticipated motions" (Memo, filed 3/25/16 p3 lns17-19). However, California Rule of Court, rule 3.724 only requires parties to resolve motions "if possible." (Cal. Rules of Court, rule 3.724.) Here, it was clearly not possible. The parties met via email and telephone and discussed substantive issues but did not ultimately agree on a resolution (Declaration of Karine Akopchikyan, filed 3/25/16 Exs. 3,4). This demonstrates compliance with, not a violation of California Rule of Court, rule 3.724.

Code of Civil Procedure section 430.41

Before filing a demurrer, the demurring party must meet and confer in person or by telephone with the party that filed the pleading which is subject to the demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. (Code Civ. Proc., §430.41(a).) The parties are not required to reach an agreement. (Code Civ. Proc., §430.41(a)(3).)

Defendants assert that Plaintiff's conduct in refusing to agree to their proposed amendments is "an improper use of the new statutory scheme" (referring to Code Civ. Proc., § 430.41) (Memo, filed 3/25/16 p4 ln11). However, failure to reach an agreement does not violate Code of Civil Procedure section 430.41. Code of Civil Procedure

section 430.41 only requires the parties to meet and confer prior to filing a demurrer to try and resolve issues. Here, the parties met via email and telephone and discussed substantive issues but did not ultimately agree on a resolution (Declaration of Karine Akopchikyan, filed 3/25/16 Exs. 3,4). This demonstrates compliance with, not a violation of Code of Civil Procedure section 430.41.

First Amended Complaint

A party may amend its pleading once without leave of the court at any time after a demurrer is filed but before the demurrer is heard, if the amended complaint is filed and served no later than the date for filing an opposition to the demurrer. (Civil Code Proc., § 472.) All papers opposing a demurrer shall be filed with the court and a copy served on each party at least nine court days before the hearing. (Civil Code Proc., § 1005.)

Civil Code of Procedure section 472 specifically allows the Plaintiff to file an amended complaint *after* a demurrer is filed. It makes no difference whether "Plaintiff's counsel 'suggest[ed] that [Defendants] file [their] demur [sic]' to the Complaint" or that, "once the demurrer was filed he would *then* file a first amended complaint" (Memo, filed 3/25/16 p2 lns 17-19). Here, Plaintiffs filed their first amended Complaint on April 6, 2016. The hearing was originally scheduled for May 12, 2016, leaving twenty-six court days in between. Thus, Plaintiff filed within the allowable timeframe and his actions in so doing were entirely permissible.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/11/16 .
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Khosa v. Huff***
Superior Court Case No. 15CECG02044

Hearing Date: **May 12, 2016 (Dept. 501)**

Motions: Demurrer to the third amended complaint

Tentative Ruling:

To take the hearing off calendar, because Defendant did not comply with Code of Civil Procedure section 430.41(a) before filing the demurrer.

Before filing any new demurrer, Moving Party must fully comply with Code of Civil Procedure section 430.41(a). Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/11/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(28) **Tentative Ruling**

Re: ***Ruiz Food Products, Inc. v. Starr Surplus Lines Insurance Co., et al.***

Case No. 15CECG02067

Hearing Date: May 12, 2016 (Dept. 502)

Motion: By Defendant Starr Surplus Lines Insurance Co. to stay the action pending resolution of the actions in Los Angeles County Superior Court

Tentative Ruling:

To grant the motion for a stay pending the conclusion of the Los Angeles Superior Court actions, BC581309 and BC559560. A status conference will be set for six months from the date of this ruling to determine if the currently set trial date will be taken off calendar.

This stay will be without prejudice to a motion for relief from stay and the filing of a motion for bifurcation to determine the coverage issues in this case.

Explanation:

Defendant Starr Surplus Lines Insurance Co. seeks to stay the action under *Montrose Chem. Corp v. Superior Court* (1993) 6 Cal.4th 287. That case hold that "[t]o eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action." (*Id.* at 301.)

Likewise, where there is a parallel action regarding the underlying alleged loss, "[a] coverage action may proceed only if 'the coverage question is logically unrelated to the issues of consequence in the underlying case.'" (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1504.) However, a coverage action may also proceed if the coverage issue is one of law or turns upon factual questions that are logically unrelated to the matters at issue in the underlying action. (*GGIS Ins. Servs., supra,* 168 Cal.App.4th at 1505.)

Here, Defendant Starr Surplus argues that the concurrent cases will involve resolution of the same factual questions, namely, how much in damages the recall has caused Plaintiff. Defendant also argues that a stay is proper because the amount of

offset from possible damages paid to it in the action Plaintiff has commenced in Los Angeles Superior Court needs to be determined in both cases.

Plaintiff argues that the damages are not co-extensive and may, in fact, not be equally recoverable in both actions because of a possible cap on damages in the present action. Plaintiff also asserts that Starr would not be entitled to an offset as to the parallel action.

Here, both the present case and the cases in Los Angeles appear to concern themselves with the recovery of damages Ruiz incurred from the recall. To that extent, the cases would involve the determination of similar "factual issues." Indeed, while it is appears that there may be a cap on damages recoverable in the present case, the damages are-to one degree or another-the same damages in each case.

Likewise, whether or not there would be entitlement to an offset (or whether Defendant would be estopped from seeking an offset), the operative complaint still seeks damages which would still require consideration of evidentiary and factual issues which overlap with the other cases. Therefore, it appears likely that this case could lead to inconsistent factual determinations when compared with one or both of the Los Angeles actions. For these reasons, the motion for a stay is granted.

The Court notes that the scope of an insurance policy's coverage may present a purely legal question, unless there is ambiguous policy language that may require extrinsic evidence. (*See, e.g., GGIS Ins. Servs., supra,* 168 Cal.App.4th at 1507.) It may very well be the case that the language of the policy in this case presents such a purely legal question, or that any extrinsic evidence may be "logically unrelated" to the Los Angeles actions. However, Plaintiff has not presented such an argument or asked that the case be bifurcated to determine the coverage issues independently of any questions regarding damages. Therefore, the Court's granting of the stay is without prejudice to a possible motion for relief from stay and for bifurcation of the coverage issues.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 5/11/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Torigian v. Shmavonian et al.***
Court Case No. 10 CECG 03800

Hearing Date: May 12, 2016 (Dept. 502)

Motion: WT Capital's Motion for Attorney's Fees

Tentative Ruling:

To grant and award attorney's fees of $277,171.37, subject to a $130,250 credit, for a total award of $146,921.37.

Explanation:

The Lodestar

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.) Here, defendant WT Capital seeks a loadstar of $311,105.50 ($153,366.50 + $140,449.50 + $17,289.50.) As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method '"is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

1. Number of Hours Reasonably Expended

While the fee awards should be fully compensatory, the trial court's role is not to simply rubber stamp the defendant's request. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez*, *supra*, 36 Cal.App.4th at p. 361.) However, while an attorney fee award should ordinarily include compensation for all hours reasonably spent, inefficient or duplicative efforts will not be compensated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist*. (1985) 172 Cal.App.3d 914, 950.)

"Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary … "

(*Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 434, citing *Copeland v. Marshall* (1980) 641 F.2d 880, 891 (en banc).)

Fees Claimed by Powell & Pool for Work to 10/8/2013:

The fees claimed by Powell & Pool on WT Capital's behalf total $153,566.50. They will be reduced for several reasons.

Problem of Redacted Entries:

Many, many billing entries are either substantially or completely redacted. By the court's count there are 734 billing entries and 281 partially redacted billing entries.[1] (See MB entry for 2/7/11 [partial –"conduct research" …]; and DJP entry for 2/8/11 [complete].) This frustrates the court's ability to determine whether the time spent on a particular task was reasonable. While it may be appropriate to redact billing statements to protect the attorney-client privilege (See *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 454; *Concepcion v. Amscan Holdings, Inc*. (2014) 223 Cal.App.4th 1309, 1327), it remains the burden of the party seeking attorney fees to prove that the fees it seeks are reasonable. (*Gorman v. Tassajara Development Corp*. (2009) 178 Cal.App.4th 44, 98.) If the redaction is too aggressive, the court cannot perform its gatekeeping task of determining a reasonable fee.

However, because this court was the court in which this matter was litigated, and the court is familiar with the parties, pleadings, procedures, and events in this case, the court has laboriously undertaken to review the redacted billings to correlate them to known activities and events. In some cases, this was patently impossible, and deductions were taken. In other cases, the court has determined the time billed was excessive and made deductions.

The Torigians claim that the redacted entries total $107,526.75. However, this sum can only be arrived at by discarding all time in a block billed entry where some of the block billed time is not redacted. The Torigians request that the sum of $54,271.25 be deducted for "pervasive redactions." The court has totaled the redacted entries. Of the 734 or so billing line items, some 281, or about 38% bear some sort of redaction. This is excessive.

Of particular concern are the billing entries dated: 8/2/2011 (DJP) "work on [redacted] review and revise correspondence to attorney parker regarding same" .20 @ $285.00/hr. $57.00; 5/30/2012 (MB) "Continue analysis regarding [redacted]" review and revise letter opposing counsel regarding [redacted]" .60 @ 255.00/hr. $102; 6/29/2012 (MB) "Continue working on [redacted] review correspondence from opposing counsel regarding same" .85 @ $255/hr. $216.75; 7/25/2013 (MB) "Work on [redacted] correspondence to attorney Parker regarding [redacted]" .40 /$255 hr. $102.00; 7/30/2012 (DJP) "Correspondence to attorney Parker regarding [redacted] .50 /$300 hr. $150; 1/2/2013 (MB) "Analysis regarding [redacted] draft correspondence to

[1] Billing entries entirely redacted, including the name of the timekeeper, tasks billed, hourly rate, and total fee, were not included, because these entries were not included in the total billing.

opposing counsel regarding [redacted] analysis regarding [redacted]" .60 /$255 hr. $153.00. If the redactions of the invoices were done only to preserve the attorney-client and attorney work product privilege, as maintained by counsel for WT Capital, there would be no need to redact the subject to correspondence to opposing counsel, as disclosure of attorney-client privileged matter and work-product to opposing counsel would waive the privileges. Accordingly, the over-redaction raises the concern that the redaction obscures non-recoverable fees, such as time spent solely on Debra Berg's representation. In any regard, these specific entries were fully deducted.

Discovery Motions

The Torigians point out that WT Capital has already claimed $2,651.00 in fees for its discovery motions filed on May 31, 2011, and was awarded $1,790.00 in fees as sanctions for these motions. WT Capital may not recover the full $2,651.00 originally sought for the preparation of these motions twice and must satisfy itself with what was awarded. This represents a reduction of $861.00. However, WT Capital claims that an additional $2,205.00 in fees was incurred after the motions were filed, in the preparation of the replies and in the appearance at the hearings. These fees were never disclosed in papers filed with respect to the discovery motions. As such, WT Capital argues, this $2,205.00 remains to be awarded. WT Capital is correct. This court has not ruled on the propriety of these fees, and no principal of judicial estoppel prevents awarding them at this time.

As for the time spent in unsuccessfully opposing the Torigians' motion to compel, WT Capital claims there is no authority that would deny it its $1,086.00 in attorney's fees. However, there is. The Torigians were awarded sanctions for prevailing on their motion. Such sanctions are mandatory, "[t]he court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel …". By awarding the Torigians their attorney's fees for bringing the motion, this court necessarily denied WT Capital its attorney's fees in opposing the motion. It may not now recover them. Accordingly, $1,086.00 must be deducted from the fees awarded.

Fees Previously Claimed by Debra Berg:

The Torigians protest that WT Capital is seeking to recover for fee entries previously claimed by Debra Berg in her motion for attorney's fees. The Torigians argue the same fees could not have been incurred on behalf of both clients. However, they identify no specific time entries that they contend relate solely, or even partially to Debra Berg. It appears to the Court, from a perusal of the bills, that the majority of the fees claimed were with incurred primarily for the benefit of WT Capital (certain discovery, WT Capital's motion for summary judgment etc.) or were incurred on tasks beneficial to both parties (depositions, mediation, document review) with a few exceptions, discussed below.

"To the extent [a prevailing defendant's] shared counsel engaged in litigation activity on behalf of [a codefendant] for which fees are not recoverable, the [trial] court has broad discretion to apportion fees." (*Zintel Holdings, LLC v. McLean* (2012) 209

Cal.App.4th 431, 443.) "Allocation of fees incurred in representing multiple parties is not required," however, when the claims at issue are " ' " 'inextricably intertwined,' " ' " to the extent it is not possible to separate compensable and noncompensable attorney fees. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277.) Nevertheless, if a trial court desires to do so, " '[a] court may apportion fees even where the issues are connected, related or intertwined.' " (*Zintel Holdings, LLC v. McLean*, *supra*, 209 Cal.App.4th at p. 443.)

Two time entries, on 4/18/2011 and 4/19/2011, appear to relate to separate motions brought by WT Capital and Berg. The court deducts 1.55 hours at a rate of $245 per hour to apportion fees. Also, an entry dated 4/27/2011 relates to discovery responses by both WT Capital and Berg. The Court deducts .5 hours at a rate of $245 per hour as an allocation for the time spent on Berg's case. The total deduction is $502.25.

The Appellate Court Has Determined WT Capital is the Prevailing Party:

The Torigians request that this court reduce the attorney's fees from the period from August 1, 2012 to April 9, 2013 by $17,311.75 because these fees were attributable solely to the "equitable contract claims." However, the Court of Appeal clearly determined that WT Capital was the prevailing party on both the contract and tort claims in this litigation and remanded this case with instructions for this court to award WT Capital its attorney's fees. (*Torigian v. WT Capital Lender Services* (June 24, 2015) 2015 WL 3902163 at *14 ["The trial court is directed to enter a new order determining WT Capital to be the prevailing party in the action and awarding WT Capital its attorney fees and costs against the Torigians."].) No deduction will be taken.

Total Fee Award:

The total fee award for work performed by the Powell & Pool firm from the inception of the case to October 8, 2013 is $136,886.12.

Fees Claimed by Powell & Pool after 10/8/2013 and to Date:

Powell & Pool claims fees of $17,289.50 for work from August 5, 2014, to the present.

Duplicate Entries:

The Declaration of Mathew G. Backowski in Support of the Adleson fee Motion repeats the billing entries from 8/5/2013 to 10/8/2013. These fees cannot not be awarded twice. The reduced amount that was awarded for these entries which were heavily redacted will be deducted.

Redactions & Redundancy:

Once again the bills are heavily redacted. (See 8/27/2013 entry (MB) "Review [redacted]; analysis regarding [redacted]" .30 @ $255/hr.; 5/13/2014 (MB) "Continue

working on [redacted] .40 @ $255/hr.; etc.) Of the approximately 117 billing entries, 62 have some type of redaction, meaning 52% are redacted in some manner. This is again, excessive. Although it remains the burden of the party seeking attorney fees to prove that the fees it seeks are reasonable (*Gorman v. Tassajara Development Corp.*, *supra*, 178 Cal.App.4th at p. 98), the Court has again gone through the entries and attempted to correlate the redacted entries to known activities and events. It appears that much of the redacted time was spent on miscellaneous appellate tasks which would appear redundant with the time billed by the Adleson Hess & Kelly firm. This time totaled approximately 22.2 hours at a rate of $255, for a total of $5,661.00 and 1.25 hours at a rate of $300 per hour, for a total of $375.00. This time was disallowed with two notable exceptions.

The court allowed 14.15 hours of time at a rate of $255 for Mr. Backowski's work on Appellant's opening brief. The Court also allowed 2.05 hours at a rate of $255 per hour for Mr. Backowski's work on reviewing the opposing brief and preparing the reply brief.

Clerical & Excessive Time:

Two entries on 10/24/2013 were for clerical work: "prepare proofs of service for Notice of Association of Counsel" (AH) .25 hrs. at $75/hr. and "File Notice of Association of Counsel and serve court of appeals" (AH) 1.00 hrs. at 75//hr. As was the entry dated 4/15/2014: "Prepared proofs of service for acknowledgements of satisfaction of judgment" (GN) .20 hrs. at $95/hr. Accordingly, the sum of $112.75 was deducted.

Total Fee Award:

The total deductions from Powell & Pool's billings after October 8, 2013, and to date are $7,009.00. A total fee of $10,280.50 is allowable.

Fees Claimed by Adleson, Hess & Kelly, LP:

The total fees claimed by Adleson, Hess & Kelly, LP for work on the appeal, post appellate matters and motion for attorney's fees are $140,449.50. A lesser amount is awarded based on the following deductions.

Excessive Time:

A number of entries bill excessive time to routine tasks, including: 10/16/2013 (LJP) "Prepare Notice of Appeal" .30 hrs. at $325; 10/17/2013 (LJP) "Attempted phone call; left message for Don Pool" .20 hrs. at $325; 10/21/2013 (LJP) "Phone call to plaintiffs' counsel re stip for record on appeal. Left message" .20 hrs. at $325; 10/21/2013 (LJP) "Email plaintiffs' counsel re stip to use original court file" (LJP) .20 hrs. at $325; 10/23/2013 (LJP) "Prepare association of counsel" .30 hrs. at $325; 10/24/2013 (LJP) "Revise association of counsel" .25 hrs. at $325; 11/25/2013 (LJP) "Prepare civil appeal statement" .9 hrs. at $325; 11/26/2013 (LJP) "Review/revise court of appeal certificate interested persons etc. for filing" .30 hrs. at $325; 12/31/2013 (LJP) "Research & analysis time to file appellate brief" .30 hrs. at $325; 2/21/2013 (LJP) "Review & analysis of court

order setting opening brief date" .20 hrs. at $325; 6/30/2014 (PMA) "Review incoming correspondence email from court of appeal re: order extending respondent's brief" .20 hrs. at $495; 9/25/2014 (LJP) "Review court website to see if respondent brief filed" .2 hrs. at $325; and 12/16/2014 (PMA)"Email to court to register for information on case" .20 hrs. at $495. The court, where possible has reviewed all the relevant documents. The notice of appeal was a Judicial Council form. Leaving a voicemail does not take more than 6 minutes. The association of counsel was a few paragraph form with many signature blanks. The civil appeal statement, and certificate of interested persons are basic appellate forms. The time to file appellate briefing is well established. (Cal. Rules of Court, rule 8.212(a)(1).) Checking brief appellate court emails and the appellate court's website are likewise short tasks, not taking more than six minutes. Accordingly, the Court makes a total deduction of 2.15 hours at rate of $325 per hour and .2 hours at rate of $495 per hour, for a total reduction of $797.75.

Amicus Proof of Service Issue:

It appears from the timesheets that on December 20, 2014, the Court of Appeal sent out an email to the effect that one of the Amicus briefs lacked a proof of service. Mr. Adleson instructed Ms. Parrella to call Amicus counsel. In all, .20 hours were billed at rate of $495 and .7 hours were billed at a rate of $325. However, correction of the proof of service was Amicus counsel's responsibility not WT Capital's counsel's responsibility. Thus, a reduction of $326.50 is called for.

Publication Efforts:

Adleson's efforts to get the *Torigian v. Shmavonian* opinion published added nothing to the litigation of the merits of this matter, while it may have benefited the defendant's business or the trade as a whole. Accordingly, WT Capital agrees to withdraw the sum of $6,070.50 representing work done on attempting to obtain publication of the opinion.

Coordination with Amicus Counsel:

The Torigians seek to disallow any billing entry that involves obtaining Amicus counsel, communication with Amicus counsel, and review of Amicus counsel's work. Because amicus curiae briefs are valuable vehicles to advance a side's argument, the court should not disallow all time relating to Amicus counsel. It was appropriate to confer with Amicus counsel to determine which issues should be raised in each brief, to review each other's briefs and to coordinate their efforts on appeal, provided the time spent doing so was not altogether excessive. The Court has reviewed the billings and although block billing obscures the exact amount of time spent on amicus related activities, it does not appear that the time spent was excessive.

Motion for Attorney's Fees:

Appellate counsel spent 19.9 hours preparing the attorney's fee motion. The motion is a treatise on attorney's fee law that is misplaced in this case. The Fifth District Court of Appeal ordered this Court to award fees. There was no reason to cite

anything but the Court of Appeal opinion and prepare some declarations. Accordingly, the Court deducts 10 hours of time at a rate of $325.00 for a total reduction of $3,250.00.

Total Fee Award:

A sum of $130,004.75 will be awarded, inclusive of the work done on the attorney's fee motion.

2. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (*Mandel v. Lackner* (1979) 92 Cal. App. 3d 747, 761.)

The rates for the Powell & Pool firm are reasonable. Don J. Pool has been practicing since 1993, with an emphasis in commercial litigation. Mathew J. Backowski has been practicing since 2001. Their rates of $285 to $300 and $245 to $255 are appropriate, as are their paralegal rates which range from $75 per hour to $105 per hour.

The rates for Phillip M. Adelson is appropriate for Sacramento/San Jose, but is too high for Fresno. Appellate specialists make only $395 to $425 an hour in Fresno. However, plaintiffs have not raised this objection, and the Court will not raise it for them.

Adelson's assistant attorney, Lisa J. Parrella, has been practicing for 22 years, six of which have been in California, and charges $325 an hour. Her rate is reasonable.

Credit for Settlement with Shmavonian:

Shmavonian and WT Capital were parties to a Declaration of Default and Instructions to Foreclose which contained an indemnification clause:

> Beneficiary hereby indemnifies WT Capital from any and all liability, including reasonable attorneys' fees and costs incurred in defending a legal action naming WT Capital as a defendant, which might arise during the course of or subsequent to WT Capital's execution of its duties hereunder … unless said liability arises due to WT Capital's own negligence or mistake as determined by a court of competent jurisdiction.

(Phillips Decl. ¶ 3a, Ex. A, ¶ 9, Ex. A § V.)

Based on this indemnity clause, WT Capital demanded that Shmavonian pay its defense costs in the instant action, Case No. 10 CECG 03800, by the Torigians against WT Capital. (Phillips Decl. ¶ 3e, Ex. E.; See letter dated November 5, 2010.)

Eventually, on April 13, 2013, WT Capital filed a complaint for express written indemnity, implied equitable indemnity, intentional misrepresentation, and negligent misrepresentation against Shmavonian. (Phillips Decl. ¶ 3a, Ex. A.) The complaint specifically alleged "[a]s a result of the actions and misrepresentations by Shmavonian, WT Capital was forced to incur legal fees and costs in defending the *Torigian* Action. As of March 21, 2013, WT Capital has incurred necessary and reasonable attorneys' fees and other legal costs in defending the *Torigian* Action in a sum in excess of $230,000.00."

In November 2014, Shmavonian paid WT Capital $250,000 to settle the lawsuit against him. (Phillips Decl. ¶ 4, Ex. I.) Shmavonian executed a Stipulation and Order for Entry of Judgment upon Default. In it, Shmavonian agreed to pay $250,000 by cashier's check to settle WT Capital's claims against him by November 14, 2014 and to pay $60,000 to the Torigian's to the Torigian's toward the Torigian Judgment and Fee award, paying the balance within 10 days of any court order determining the balance, "and in no event shall WT Capital be liable for any amounts due under the judgment or Torigian Fee Award."

On November 6, 2014, Shmavonian paid WT Capital the $250,000 due under the settlement. (Phillips Decl. ¶ 4.) On December 2, 2014, Shmavonian paid all amounts due under the Torigian's Judgment, cost bill and attorney fee award. (Parker Decl. ¶ 25.)

The Torigians argue that the $250,000 that WT Capital recovered was clearly for the attorney's fees and costs incurred in this action, and if this court does not credit the full $250,000, WT Capital will achieve a double recovery. WT Capital argues that the action against Shmavonian was more than an indemnity action, it involved fraud claims and "substantial" claims for punitive damages. Moreover, the settlement represented a compromise of WT Capital's claims to recover the $164,385.60 spent defending Debra Berg and the $99,815.94 in attorney's fees and costs incurred in prosecuting the action against Shmavonian. Thus, WT Capital takes the position that even if allocation is required, the $250,000 would not cover the tort damages, exemplary damages, Berg defense costs, and attorney's fees and costs in the Shmavonian action.

WT Capital's Reply submitted by Powell & Pool fails to argue that apportionment is improper. WT Capital's Reply submitted by Adleson, Hess & Kelly, LP asserts that the Torigian's authority is generally inapplicable because the Torigians were not a party to, or a third party beneficiary of the contract between WT Capital and Shmavonian. However, it is apparent that some credit must be made for the settlement with Shmavonian to prevent a double recovery.

First, while the complaint against Shmavonian sounded in both tort and contract, the causes of action sought the same damages – the attorney's fees incurred in litigating the instant action brought by the Torigians through appeal and the fees for defending Debra Berg. This is apparent from the face of the Complaint. (Compare ¶¶ 20, 27, 33, 41, 48 and prayer.) The only difference is that the contractual claims

encompassed the attorney's fees for bringing the action against Shmavonian and the tort claims carried the potential of punitive damages.

"It is a just and well-established doctrine that there shall be but one satisfaction accorded for the same wrong." (*Butler v. Ashworth* (1895) 110 Cal. 614, 618.) Nevertheless, the Supreme Court of California has long adhered to the doctrine that if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor. (*Helfend v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 1, 6.) "The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities." (*Id*. at p. 10.) Far from providing a victim a double recovery, the collateral source rule prevents a tortfeasor to be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance. (*Ibid*.)

However, "the overwhelming weight of authority in California and other jurisdictions has rejected the extension of the collateral source rule to breach of contract." (*Plut v. Fireman's Fund Ins. Co*. (2000) 85 Cal.App.4th 98, 107-108 (*Plut*).) In *Bramalea California, Inc. v. Reliable Interiors, Inc*. (2004) 119 Cal.App.4th 468, the California Court of Appeals held that the collateral source rule did not apply to a breach of contract claim where a contractor sought to obtain attorney's fees pursuant to an indemnity agreement. (*Id*. at p. 472.) The court held that even though the indemnity agreement explicitly provided for attorneys' fees, because the contractor had already recovered the fees through an insurance policy, any recovery the contractor might receive would be a prohibited double recovery unless allowed by the collateral source rule. (*Ibid*.) The court reasoned that the collateral source rule did not apply because it applies to tort damages, not contract damages. (*Plut*, *supra*, 85 Cal.App.4th at p. 107.) This is due to the fundamental differences between tort and contract damages. (*Id*. at 108.) "The collateral source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance." (*Patent Scaffolding Co. v. William Simpson Const*. (1967) 256 Cal.App.2d 506, 511.) In contrast, " 'the tortfeasor's responsibility [is] to compensate for all harm that he causes, not confined to the net loss that the injured party receives.' " (*Plut*, *supra*, 85 Cal.App.4th at p. 108.)

Accordingly, the portion of the $250,000 settlement that represents the portion of the recovery of the attorney's fees herein at issue should be applied as a credit. At the time the settlement with Shmavonian was executed, November 6, 2014, according to the billing statements submitted on this motion, Powell & Pool had billed $170,417.50. Adleson, Hess & Kelly, LP had billed $90,219.25. WT Capital had incurred fees of $99,815.94 to prosecute the action against Shmavonian. There is substantial overlap between the fees incurred to represent WT Capital and Berg; thus the $164,385.60 figure offered by WT Capital is simply not accurate as it double counts fees already claimed by WT Capital. The Court will accept the Torigian's calculation that $121,807.85 of the fees claimed by WT Capital in the instant motion were claimed by Berg in her motion for

attorney's fees and conclude that the actual attorney's fees attributable to Berg are $45,577.75. Accordingly, the value of the attorney's fee claims alone total $312,901.40. Costs claimed in this action on trial and appeal are $10,278.66. Thus, damages in the Shmavonian action would have totaled at least $323,180.06.

The settlement is unallocated between the tort and contract claims. Because there is absolutely no evidence on which the Court could find what amount of punitive damages would have been awarded, even if the Court assumed Shmavonian's actions were malicious, the Court will not assume an award of punitive damages. Accordingly, the Court determines a credit of $137,750 is appropriate, based on the following: Berg's attorney fees represent 14.1% of the potential judgment; the attorney's fees incurred to prosecute the action against Shmavonian are about 30.8% of the potential judgment; the costs are 3% of the potential judgment, meaning the fees claimed here by WT Capital represent approximately 52.1% of the potential judgment. $130,250 represents 52.1% of the settlement amount of $250,000.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 5/11/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Saint Agnes Medical Center v. Data Central Collection Bureau***
Case No. 13 CE CG 02789

Hearing Date: May 12th, 2016 (Dept. 503)

Motion: Application for Default Judgment

Tentative Ruling:

To deny the application for default judgment without prejudice, as it is premature. No default has been entered on the first amended complaint, which is the operative pleading, at this time. Plaintiff shall file a proof of service for the first amended complaint and a new application for entry of default based on that proof of service. Only after plaintiff has obtained a default on the first amended complaint can it seek entry of default judgment.

If oral argument is requested, it will be heard on May 17th, 2016 at 3:30 p.m. in Department 503.

Explanation:

The plaintiff filed a request to enter default on the first amended complaint (FAC) on April 8th, 2016, the same date that the application for default judgment was filed. However, the clerk denied the application for default because a default had already been entered on the original complaint. Unfortunately, the clerk's denial was made in error, since the filing of the FAC on December 16th, 2013 "opened" the default. Nevertheless, plaintiff was not entitled to entry of the default on the FAC, since no proof of service has been filed for the FAC at this time. In other words, the default should have been denied, but for different reasons than the clerk cited in her denial.

In any event, plaintiff cannot obtain a default judgment at this time, since no default has been entered yet on the FAC. Nor can plaintiff obtain entry of a default without first filing a proof of service showing that the FAC was served on the defendant. Therefore, the court intends to deny the application for default judgment without prejudice. The court orders plaintiff to file a proof of service for the FAC and then request a new default based on that proof of service. Only then will plaintiff be able to seek entry of a default judgment.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5/10/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***De La Luz Lopez v. Gibson Wine Co. et al.***
Court Case No. 13 CECG 01745

Hearing Date: May 12, 2016 (Dept. 503)

Motion: Gibson's Motion for Determination of Good Faith Settlement

Tentative Ruling:

To grant.

If oral argument is requested, it will take place on Tuesday, May 17, 2016 at 3:30 p.m. in Department 503.

Explanation:

Under Code of Civil Procedure section 877.6, a settlement entered by one or more of several joint tortfeasors may be determined by the court to be in "good faith." If the court does so, this bars any other joint tortfeasor from any further claims against the settling defendant for equitable comparative contribution, equitable indemnity or comparative fault.

In considering a motion under Section 877.6, courts are called upon to balance the statute's twin goals of (1) encouragement of settlements, and (2) equitable sharing of costs among the parties at fault. (*Tech-Bilt v. Woodward-Clyde & Assoc*. (1985) 38 Cal.3d 488, 494 (*Tech-Bilt*).) The standard is whether the amount of the settlement is within the "reasonable range" or "ballpark" of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. (*Id*. at. p. 499.) "In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages...What is required is simply that the settlement not be grossly disproportionate to the settlor's fair share." (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 874.) "And even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured joint tortfeasor." (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.)

Tech-Bilt provided the following non-exclusive list of factors for the court to consider in determining the "good faith" of a settlement: "A rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial." (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.) "Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants". (*Ibid*.) "Finally, practical considerations obviously require that

the evaluation be made on the basis of information available at the time of settlement." (*Ibid*.)

The moving-party's initial evidentiary burden depends on whether the 'good faith' of the settlement is being contested. If the nonsettling defendants do not oppose the motion on the good faith issue, a 'barebones' motion which sets forth the grounds of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261; Rylaarsdam & Edmons, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) § 12:871-12:872.)

Here, the motion is uncontested. Death benefits of $125,000 have already been paid by the worker's compensation system. Gibson has some argument that it was covered by the exclusivity provision of the worker's compensation system, which had some chance of prevailing at trial. Given that the $920,000 settlement is only $80,000 below policy limits and the settlement was reached after numerous settlement conferences and mediation, the amount paid in settlement is fair and the settlement does not appear to have been the result of collusion, fraud or tortious conduct. Moreover the allocation of the proceeds among the plaintiffs is fair and reasonable with the bulk of the money going to decedent's parents, and the lesser amounts going to the children of decedent's girlfriend.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5/11/16 .
(Judge's initials) (Date)